

**Advisory Action
Before the Filing of an Appeal Brief**

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|------------------------|---------------------|--|
| Application No. | Applicant(s) | |
| 09/529,342 | CLARKE ET AL. | |
| Examiner | Art Unit | |
| Nelson Yang | 1641 | |

—The MAILING DATE of this communication appears on the cover sheet with the correspondence address —

THE REPLY FILED **19 October 2009** FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

a) The period for reply expires 7 months from the mailing date of the final rejection.
 b) The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. The Notice of Appeal was filed on **18 August 2009**. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 (a) They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) They raise the issue of new matter (see NOTE below);
 (c) They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet. (See 37 CFR 1.116 and 41.33(a)).

4. The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. Applicant's reply has overcome the following rejection(s): _____.
 6. Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. For purposes of appeal, the proposed amendment(s): a) will not be entered, or b) will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: _____.
 Claim(s) objected to: 59.
 Claim(s) rejected: 42,45-52,54-61,64-66 and 69.
 Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
 12. Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. Other: Interview summary 11/5/2009.

/Nelson Yang/
Patent Examiner, Art Unit 1641

Continuation of 3. NOTE: the amendments to the claims would require further consideration and search.

Continuation of 11. does NOT place the application in condition for allowance because: applicant's arguments with respect to the finality of the action filed March 18, 2009 is not found persuasive, the Office notes that the Cullis reference was in fact brought in to address the fact that the metabolic signal was extracellular, which excluded the intracellular metabolic signals taught by Smith et al., as applicants argued in the response filed November 24, 2009 (see p. 10), thus necessitating the new grounds of rejection. The Office further notes that by narrowing the limitation of "metabolic signals" to "extracellular metabolic signals", the claims would explicitly exclude intracellular metabolic signals, such as those disclosed by Smith et al. Since applicants clearly argued that the amendment was made to specifically overcome the rejections of record, which would necessitate a new rejection, the finality of the action filed March 18, 2009 is found proper, and applicant's arguments are found unpersuasive.

With respect to applicant's arguments that Cullis does not relate to an in vitro/ex vivo assay, the Office notes that this limitation was introduced in the after final amendment, and therefore, has not been considered.

With respect to applicant's argument that the prior art does not directed toward detecting metabolic cells, the Office notes that the claims as recited perform this function by monitoring a species released by the cells, which is also taught by Cullis.

With respect to applicant's arguments that the prior art fails to teach modifying the liposomes so that they are targeted to and aggregate around the cells of interest, the Office notes that the prior art does teach this, although the Office acknowledges that this is not performed in the same way as applicants intended or envisioned. More specifically, because the liposomes in the prior art target the cells of interest, they would by default aggregate around cells of interest, and bind to each other indirectly through the cell. Therefore, the limitation is met.

The Office, however, notes, that should applicants amend said claims to recite that the cells are treated with particles under such conditions that allow primary binding with the cells of interest, and then, once primary binding has occurred, a reagent is added to initiate secondary binding between said particles, the claims would be novel over the art rejections of record. Should applicants choose to amend the claims to incorporate this limitation, this amendment may be introduced in a supplemental after final amendment

Applicant's arguments with respect to claim 59 is found persuasive. However, claim 59 remains objected to for depending on a rejected claim.